

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs May 19, 2009

STATE OF TENNESSEE v. DEXTER MCMILLAN

**Appeal from the Criminal Court for Knox County
No. 84674 Richard R. Baumgartner, Judge**

No. E2008-00649-CCA-R3-CD - Filed June 9, 2009

The defendant, Dexter McMillan, challenges the Knox County Criminal Court's order revoking his probation, ordering him to serve 120 days' incarceration in the Knox County jail, and extending his probationary sentence for an additional year. Discerning no error, we affirm the order of the trial court.

Tenn. R. App. P. 3; Judgment of the Criminal Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which NORMA MCGEE OGLE and D. KELLY THOMAS, JR., JJ., joined.

Donna Robinson Miller, Chattanooga, Tennessee (on appeal); and Aubrey Davis, Knoxville, Tennessee (at hearing), for the appellant, Dexter McMillan.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Takisha Fitzgerald, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

On October 2, 2006, the defendant pleaded guilty to a nine-count indictment for a two-year effective sentence. His October 2, 2006 convictions included one count of fleeing an arrest after receiving a signal from law enforcement officers to stop, *see* T.C.A. § 39-16-603 (2006), obstructing a lawful arrest, *see id.* § 39-16-602, driving under the influence, *see id.* § 55-10-401, driving on a suspended license, *see id.* § 55-10-504, and possession of cocaine and drug paraphernalia, *see id.* §§ 39-17-418, -425. The trial court ordered the defendant to serve 115 days in the Knox County jail and to serve the remainder of his sentence on probation to expire on June 9, 2008.¹

¹We note that the record does not contain the judgments reflecting these sentences. We glean this information from the trial court's order revoking the defendant's probation.

A probation violation warrant was issued on October 12, 2007, alleging that the defendant had violated his probationary terms because he was cited on June 17, 2007, for driving on a suspended license and was arrested on October 2, 2007, for driving under the influence, violating the implied consent law, reckless driving, and driving on a revoked license. The warrant was served on the defendant on January 22, 2008. The probation violation warrant was amended on February 7, 2008, to reflect that the defendant further violated his probation due to an August 13, 2007 arrest for simple possession or casual exchange of a controlled substance and by failing to pay his court costs.

On February 21, 2008, the trial court held a probation revocation hearing. Knoxville Police Department Officer James Lockmiller testified that at 9:24 p.m. on October 1, 2007, he and Officer Marty Cruze observed a black Cadillac traveling east in a westbound lane to pass another vehicle. The officers followed the Cadillac, which drove into the opposite lane again and passed other cars. Officer Cruze, who drove the police cruiser, “initiated [the] emergency equipment in an attempt to catch up to the vehicle.”

The officers followed the Cadillac and observed it turn into a public housing development. Officer Lockmiller testified that he and Officer Cruze approached the vehicle in the parking lot with caution due to the “erratic” driving. Officer Lockmiller identified the defendant as the operator of the Cadillac. He testified that Officer Cruze gave multiple commands for the defendant to put up his hands and that, after several attempts, the defendant complied. Officer Cruze ordered the defendant to turn off the Cadillac’s engine and exit the vehicle, and the officers took the defendant into custody for reckless driving.

Officer Lockmiller testified that the defendant was “profusely sweating,” “not talkative,” and “appeared to be under the influence of some intoxicant.” The officers transported the defendant to the Safety Building where he refused to perform a field sobriety test or take a blood-alcohol test. The officers became concerned about the defendant’s unresponsive behavior and transported him to St. Mary’s hospital for treatment. Officer Lockmiller testified that the defendant continued to be unresponsive while at the hospital.

Officer Joel Ascencio of the Knoxville Police Department testified that, at approximately 1:00 a.m. on July 14, 2007, he noticed the defendant enter a convenience store while leaving his Cadillac running with its lights on and music “blaring.” Officer Ascencio testified that, after waiting for the defendant to exit the convenience store, he informed the defendant that leaving his vehicle running violated a Knoxville City Ordinance and that his music was too loud. He asked the defendant for consent to search his person, and after the defendant consented, the officer found a pill bottle with the name torn off the label. Officer Ascencio also observed an open beer bottle in the vehicle’s front seat.

Officer Ascencio did not arrest the defendant; however, he wrote a citation for possession of oxycodone, which he believed was in the pill bottle. He wrote city citations for the defendant’s leaving his vehicle unattended, noise violation, and open-container violation. The first two charges were dismissed, and the defendant received a probationary sentence from the City of Knoxville for the open-container violation.

Suzanne Greene testified that she kept the probation file for the defendant. She did not serve as the defendant's probation officer, and she admitted that she could not testify about every conversation between the defendant and his probation officer. Ms. Greene testified that the defendant had last visited the probation office on October 5, 2007, and that the probation violation warrant signed on October 12, 2007, issued as a result of his receiving the charges described by Officer Lockmiller. Ms. Greene testified that the probation violation warrant was served on the defendant on January 22, 2008.

The 47-year-old defendant testified regarding his October 2, 2007 arrest that he never veered into the opposite lane of traffic. He said, "I think I was just a stereotype with the type of car I was driving." He stated that he did not notice the police cruiser with its lights on behind him until he pulled into the housing development's parking lot. He testified that he had had a "couple of shots" of "Hennessy" but that he "wouldn't consider [him]self as being drunk." The defendant testified that he was not on any medication at that time, either.

The defendant testified that the police officers handcuffed him and transported him to the "Patty Wagon." He stated that an officer then placed another man in the wagon who was not handcuffed. From that point he only remembers that he was "knocked out, out cold." The defendant testified that when he awoke, he was in the hospital. He could not recall ever being at the Safety Building, and he testified that he had "scars and stuff" from that evening.

The defendant testified that he never possessed any oxycontin on July 14, 2007. He testified that in 2007, he had surgery at the Veteran's Administration ("VA") in Johnson City, Tennessee, on his rotator cuff and his knee. He testified, and presented VA records indicating, that he was prescribed hydrocodone in connection with the surgeries. He testified that he informed his probation officer of these procedures.

The defendant stated that on July 14, Officer Ascencio walked into the convenience store and "got [him] out and told [him] to get on the car, and . . . proceeded to do his search." The defendant testified that he attempted to explain to the officer that his wife was driving the vehicle but that they had been fighting and she left the car. He stated that the medication recovered by Officer Ascencio was his prescription hydrocodone for his shoulder.

On cross-examination, the defendant admitted that, after being cited by Officer Ascencio, he drove his vehicle home without a proper driver's license. He argued that he did not have an open beer bottle in the vehicle; however, he admitted he had a "[j]ust popped" bottle of "Hennessy" in the front seat. The defendant also admitted that he drove on a revoked license on October 2, 2007.

The trial court first noted that "there's no question about that fact that [the defendant] has committed offenses that he shouldn't commit," referring to his two driving on a revoked license offenses and his open-container violation. However, the trial court found insufficient the proof of the defendant's October 2, 2007 intoxication and of illegal possession of oxycontin on July 14, 2007. The trial court also chose not to consider the previously-dismissed city ordinance violations for the defendant's leaving his car unattended and excessive noise.

The trial court then noted that the defendant had failed to report to his probation officer and failed to pay any fines. The court determined that the defendant was in violation of his probation and ordered him to serve 120 days' incarceration in the Knox County jail and then be placed on probation for an additional year until June 9, 2009.

The defendant appeals, arguing that the trial court erred in revoking his probation "where there was no evidence that defendant had yet been convicted of the offenses of driving on a revoked license or reckless driving." He also alleges error in the trial court's extending his probationary sentence an additional year on the basis of his failure to pay court costs "where defendant was disabled and mentally ill, and there was absolutely no proof that defendant had wilfully failed to pay same." The State disagrees.

A trial court may revoke a sentence of probation upon a finding by a preponderance of the evidence that the defendant has violated the conditions of his release. T.C.A. § 40-35-311(e) (2006); *Stamps v. State*, 614 S.W.2d 71, 73 (Tenn. Crim. App. 1980). A revocation will be upheld absent a showing that the trial court abused its discretion. *State v. Harkins*, 811 S.W.2d 79, 82 (Tenn. 1991). In order to establish that the trial court has abused its discretion, the defendant must show that there is no substantial evidence to support the determination that he violated his probation. *Id.* (citing *State v. Grear*, 568 S.W.2d 285, 286 (Tenn. 1978); *State v. Delp*, 614 S.W.2d 395, 398 (Tenn. Crim. App. 1980)). Relief will be granted only when "the trial court's logic and reasoning was improper when viewed in light of the factual circumstances and relevant legal principles involved." *State v. Shaffer*, 45 S.W.3d 553, 555 (Tenn. 2001) (quoting *State v. Moore*, 6 S.W.3d 235, 242 (Tenn. 1999)). Upon finding a violation, the trial court may "revoke the probation and suspension of sentence and cause the defendant to commence the execution of the judgment as originally entered." T.C.A. § 40-35-311(e). Furthermore, when probation is revoked, "the original judgment so rendered by the trial judge shall be in full force and effect from the date of the revocation of such suspension." *Id.* § 40-35-310. The trial judge retains the discretionary authority to order the defendant to serve the original sentence. *See State v. Duke*, 902 S.W.2d 424, 427 (Tenn. Crim. App. 1995). A trial court revoking probation has the authority to extend the period of probation supervision for a period not to exceed two years. T.C.A. § 40-35-308(c).

We note that the trial court carefully considered the facts presented at the revocation hearing in determining that the defendant violated his terms of probation. The trial court found "no question" that the defendant drove with a revoked license on two occasions and possessed an open alcohol container in his vehicle. The defendant admitted to these violations of law, and the evidence supported these findings by the court. Further, the defendant failed to comply with his probation appointments and pay court costs. Although the defendant argues that his failure to pay court costs resulted from his mental illness and disability, he made no such argument at the revocation hearing and has waived his argument. *See, e.g.*, Tenn. R. App. P. 36(a). The evidence amply supports the trial court's decision to revoke the defendant's probation.

The defendant argues that the trial court had no authority to extend the defendant's probationary sentence for one year. We disagree. The trial court, upon finding that the defendant violated his probationary sentence acted within its discretion in extending his probationary term for one year. *See* T.C.A. § 40-35-308(c). The court's determination that the defendant serve an

additional 120 days' incarceration in the Knox County jail was a permissible condition of the defendant's extended probationary sentence. *See* T.C.A. § 40-35-307(a) ("A defendant receiving probation may be required to serve a specific portion of the sentence in periodic confinement in the local jail"); *id.* § 40-35-306(a) (permitting a trial court to sentence a defendant to split confinement with probation following incarceration). We will not disturb the trial court's modification of the defendant's probation following his revocation.

JAMES CURWOOD WITT, JR., JUDGE